

**MAY, Judge**

Richard Samuels appeals the denial of his petition for post-conviction relief. He claims his trial counsel was ineffective for failing to object to a jury instruction. We affirm.

### **FACTS AND PROCEDURAL HISTORY**

The details of Samuels' crime were stated in his direct appeal:

At approximately 10:00 a.m. on January 13, 2006, Scott Liose entered his garage, located at the back of his Indianapolis residence. Through the garage's windows, Liose had an unobstructed view into the backyard of his neighbor, Melissa Combs. Liose noticed headlights shining through the windows and heard an engine revving. Liose saw a sports-utility vehicle in Combs' backyard, near a utility shed. Liose noticed that the shed's doors were open and that the SUV appeared to be stuck in mud. Thinking it odd that the SUV was in Combs' yard, Liose asked his wife, Colette Liose, to contact Combs at work while he remained in the garage. At Combs' behest, Colette contacted 911 to report the vehicle.

Liase continued to watch the SUV for approximately thirty minutes. At some point, Samuels exited the SUV. Samuels "was constantly going to the back of the truck and ... trying to get something under the wheels of the truck." (Tr. 69). Among the items that Samuels attempted to place under the wheels were some pots from the shed and a board.

Approximately thirty minutes after Colette telephoned 911, Marion County Sheriff's Deputy William Vasquez and his trainee, Deputy Christopher Sherrell, arrived at Combs' residence and parked in the front of the residence. As Deputy Vasquez walked along the side of Combs' house, toward the backyard, he observed Samuels, carrying a shovel and walking toward him. Deputy Vasquez ordered Samuels to put down the shovel and "asked him what was going on." (Tr. 89). Samuels answered that he was there to get some firewood from the yard of Combs' neighbor and had gotten stuck in the mud.

Deputy Vasquez then walked to the back of Combs' residence and observed an SUV, stuck in the mud, as well as tire tracks. From the tire tracks, it appeared that the SUV had been driven through the yard. The driver's door and the tailgate were open. A lawn mower was in the back of the SUV. Deputy Vasquez noticed a blanket and several pieces of lumber lying on the ground, near the SUV. Samuels "said he was using a lot of different things to try to get his truck from the yard and become unstuck." (Tr. 133). Deputy Vasquez did not see any firewood near the SUV.

Around this time, Deputy James Merritt arrived at the scene to assist. Deputy Merritt asked Samuels why he was in Combs' yard. Samuels "said he drove back [t]here to get firewood, and pointed to the neighbor's yard." (Tr. 133).

Deputy Vasquez asked Samuels why he had a lawn mower in the SUV. Samuels "stated that a friend had given it to him and that he was doing yard work and various lawn mowing jobs." (Tr. 96). Deputy Vasquez found Samuels' explanation "very unusual, since it was raining very heavily," and "[t]he temperature was probably around 40, 50 degrees." (Tr. 96). Deputy Vasquez also asked Samuels whether "he had permission to get this firewood that he was supposed to be picking up," and Samuels replied that he did not have permission. (Tr. 102). Later, after Samuels had been placed under arrest, he informed Deputy Sherrell that he had "placed the push mower in the back of the vehicle to add weight to it, to try to get himself unstuck from the mud...." (Tr. 140).

As Deputy Vasquez was speaking with Samuels, he observed that the service door to Combs' garage, which was attached to Combs' residence, was ajar. Upon investigation, Deputy Vasquez found fresh mud on the doorjamb and just inside the garage. Samuels "[h]ad mud all over his legs, [and] his hands." (Tr. 101).

When Combs arrived at home, she informed Deputy Vasquez that the lawn mower in the back of the SUV belonged to her. Samuels was placed under arrest.

On January 17, 2006, the State charged Samuels with Count I, burglary, as a class B felony, and Count II, theft, as a class D felony. The State subsequently filed an information against Samuels, alleging him to be an habitual offender.

*Samuels v. State*, 49A02-0609-CR-742 (Ind. Ct. App. August 14, 2007), *Slip op.* pp. 2-4, *reh'g denied, trans. denied*. Samuels admitted being an habitual offender, and the jury found him guilty of both burglary and theft. The trial court sentenced Samuels to twenty-five years, with five years suspended.

In his direct appeal, Samuels argued the evidence was insufficient to convict him of Class B felony burglary and the trial court improperly admitted some of Samuels' statements to police. We affirmed Samuels' convictions.

On September 28, 2008, Samuels filed a *pro se* petition for post conviction relief, which was amended on May 13, 2010, by Samuels' appointed counsel. Samuels asserted his trial counsel was ineffective because counsel did not object to a jury instruction that Samuels believed was incorrect. The post-conviction court held an evidentiary hearing and then issued its Findings of Fact and Conclusions of Law denying Samuels' petition.

### **DISCUSSION AND DECISION**

Post-conviction proceedings afford petitioners a limited opportunity to raise issues that were unavailable or unknown at trial and on direct appeal. *Davidson v. State*, 763 N.E.2d 441, 443 (Ind. 2002). As post-conviction proceedings are civil in nature, the petitioner must prove his grounds for relief by a preponderance of the evidence. *Id.* A party appealing a negative post-conviction judgment must establish the evidence is without conflict and, as a whole, unmistakably and unerringly points to a conclusion contrary to that reached by the post-conviction court. *Id.* Where, as here, the post-conviction court makes findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6), we do not defer to the court's legal conclusions, but "the findings and judgment will be reversed only upon a showing of clear error – that which leaves us with a definite and firm conviction that a mistake has been made." *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000) (internal

citation omitted).

We review claims of ineffective assistance of counsel under the two-part test announced in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), *reh'g denied*. To prevail, a claimant must show counsel's performance fell below an objective level of reasonableness based on prevailing professional norms, *Taylor v. State*, 882 N.E.2d 777, 781 (Ind. Ct. App. 2008), and the deficient performance resulted in prejudice. *Id.* Counsel's performance is presumed effective, *Ben-Yisrayl*, 729 N.E.2d at 106, and Samuels may overcome that presumption with strong and convincing evidence. *See id.* (post-conviction petition must "offer strong and convincing evidence" to overcome the presumption that counsel's performance was effective). "Isolated poor strategy, bad tactics, a mistake, carelessness or inexperience do not necessarily amount to ineffective counsel unless, taken as a whole, the defense was inadequate." *Carr v. State*, 728 N.E.2d 125, 131 (Ind. 2000).

"Prejudice occurs when the defendant demonstrates that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006) (quoting *Strickland*, 466 U.S. at 694). We need not consider whether counsel's performance fell below the objective standard if that performance would have not changed the outcome. *Strickland*, 466 U.S. at 687.

Samuels claims his trial counsel should have objected to the following jury instruction:

The crime of Burglary is defined by law as follows:

A person who breaks and enters the building or structure of another person, with the intent to commit a felony in it, commits Burglary a class C felony.

The offense is a class B felony if the building or structure is a dwelling.

Before you may convict the defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant, Richard S. Samuels
2. knowingly or intentionally
3. broke and entered
4. the building or structure, situated at 6264 N. Tuxedo Avenue, of Melissa Combs
5. with the intent to commit a felony, theft, in it, by:
  - A. The Defendant, Richard S. Samuels
  - B. knowingly
  - C. exerted unauthorized control
  - D. over the property, that is: a lawnmower and/or shovel and/or a blanket of Melissa Combs
  - E. with the intent to deprive Melissa Combs of any of its value or use
6. and the building or structure was a dwelling[.]

(Direct Appeal App. at 85.)<sup>1</sup> Samuels argues the instruction was incorrect because the undisputed evidence indicated the lawn mower was stolen from the shed in the rear of the property, and therefore the jury may have been misled into thinking it could convict Samuels for burglary based on the theft of the lawn mower. He asserts had his trial counsel objected to the instruction, the jury would not have found him guilty of burglary. We cannot agree.

---

<sup>1</sup> Samuels provided the transcript from his original trial and the appendix for his direct appeal in the record on appeal of his denial of petition for post-conviction relief. We will refer to the transcript from his trial as “Trial Tr.” and the transcript from his post-conviction relief hearing as “PCR Tr.” We will refer to the appendix from his direct appeal as “Direct Appeal App.” and the appendix from his post-conviction appeal as “PCR App.”

To establish counsel's failure to object to the jury instruction amounted to ineffective assistance, Samuels must prove a proper objection would have been sustained by the trial court had it been made. *Potter v. State*, 684 N.E.2d 1127, 1133 (Ind. 1997). During his post-conviction hearing, Samuels offered no testimony regarding the viability of his proposed objection, and instead entered into evidence only the briefs from his direct appeal. He asked the post-conviction court to take judicial notice of the trial record. He did not explain how the objection, had it been sustained, would have changed the outcome of his trial in light of the fact the State's evidence regarding the lawn mower supported the jury's guilty verdict for theft.

Samuels' trial counsel did not object to the jury instruction, but he argued to the jury "The lawn mower was in the shed. The shed is not a dwelling. The shed is not attached to her house. There can be no burglary of the shed. So taking the lawn mower from the shed does not constitute a burglary, not as the State has charged it." (Trial Tr. at 201.) In *Henderson v. State*, 795 N.E.2d 473, 480 (Ind. Ct. App. 2003), *reh'g denied, trans. denied*, we held counsel's remarks during closing arguments may be sufficient to "dilute or dispel a concern that the jury would have been misled by the instructions." *Id.*

Counsel's remarks during closing argument regarding the lawn mower apparently were intended to clarify for the jury that the lawn mower could not be considered to prove an element of the burglary charge. We believe the argument was sufficient to "dilute or dispel" any concern that the jury might have been misled by the instruction. Samuels has not

demonstrated counsel's failure to object would have affected his conviction of burglary, and accordingly we affirm the denial of his petition for post-conviction relief.

Affirmed.

RILEY, J., and NAJAM, J., concur.